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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Communications Assistance for)
Law Enforcement Act)

CC Docket No. 97-213
DA 98-762

COMMENTS OF SPRINT SPECTRUM L.P. d/b/a SPRINT PCS

Sprint PCS hereby submits its comments in response to the FCC's Public Notice in the above-captioned matter.¹ Sprint PCS requests that the FCC reject the Joint Petition of the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI). As explained below, the Joint Petition reflects an expansive reading of the capability requirements and attempts to shift the cost of expensive, enhanced capabilities to the wireless industry. Such a cost shift is contrary to express provisions of the Communications Assistance for Law Enforcement Act ("CALEA") and congressional intent.

I. Congress Did Not Intend For CALEA to Impede the Development of New Services and Technologies

CALEA was intended to balance not only the interests of privacy and law enforcement, but also "the goal of ensuring that the telecommunications industry was not hindered in the development and deployment of the new services and technologies that continue to benefit and revolutionize society." Congress clearly recognized that the

¹ Public Notice, Communications Assistance for Law Enforcement Act, DA 98-782 (April 20, 1998) ("Notice").

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adoption of CALEA should not impair the development of new services and technologies. As the House Report on CALEA states:

For the past quarter century, the law of this nation regarding electronic surveillance has sought to balance the interests of privacy and law enforcement. * * *

[I]t became clear to the Committee early in its study of the "digital telephony" issue that a third concern now explicitly had to be added to the balance, namely, the goal of ensuring that the telecommunications industry was not hindered in the rapid development and deployment of the new services and technologies that continue to benefit and revolutionize society.

Therefore, the bill seeks to balance three key policies: (1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies.²

Moreover, Congress specifically allowed industry associations and standard-setting bodies, in consultation with law enforcement, to establish publicly available specifications creating "safe harbors" for carriers, therefore giving "those whose competitive future depends on innovation . . . a key role in interpreting the legislated requirements and finding ways to meet them without impeding the deployment of new services."³ Congress recognized that the "costs of compliance with the [capability

² H.R. 103-827.

³ H.R. 103-827 states:

"No impediment to technological innovation

"The Committee's intent is that compliance with the requirements in the bill will not impede the development and deployment of new technologies. The bill expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies. The bill establishes a reasonableness standard for compliance of carriers and manufacturers. . . . One factor to be considered when determining whether compliance is reasonable is the cost to the carrier of compliance compared to the carrier's overall cost of developing or acquiring

requirements] will depend largely on the details of the standards and technical specifications, which under the bill, will be developed over the next four years by industry associations and standard setting organizations.”⁴

In the event that industry and government cannot agree on a common standard, as is the case here, §107(b) of CALEA requires the FCC to consider the costs to industry to develop, acquire, and implement capability requirements. In making such a determination the statute provides explicit guidance to the Commission:

(b) Commission authority. If industry associations or standard-setting organizations fail to issue technical requirements or standards or if a Government agency or any other person believes that such requirements or standards are deficient, the agency or person may petition the Commission to establish, by rule, technical requirements or standards that –

(1) meet the assistance capability requirements of section 103 [47 USC 1002] by cost-effective methods;

* * *

(4) serve the policy of the United States to encourage the provision of new technologies and services to the public;⁵

CALEA places principal responsibility on industry to interpret CALEA’s capability

and deploying the feature or service in question.

“The legislation provides that the telecommunications industry itself shall decide how to implement law enforcement’s requirements. The bill allows industry associations and standard-setting bodies, in consultation with law enforcement, to establish publicly available specifications creating “safe harbors” for carriers. This means that those whose competitive future depends on innovation will have a key role in interpreting the legislated requirements and finding ways to meet them without impeding the deployment of new services. If industry associations or standard-setting organizations fail to issue standards to implement the capability requirements, or if a government agency or any person, including a carrier, believes that such requirements or standards are deficient, the agency or person may petition the FCC to establish technical requirements or standards.” H.R. 103-827 (emphasis added).

⁴ Id.

⁵ 47 USC §1006(b)(emphasis added).

requirements and to set publicly available standards, in order to find ways of implementing CALEA without impeding the deployment of new technologies and services. CALEA not only expressly requires the FCC to consider the interests of privacy and law enforcement, but also the costs imposed on industry when government and industry cannot agree on a common standard.

II. The Interpretation Put Forth in the Joint Petition Will Burden New Entrants Disproportionately

Congress intended that the costs of implementing CALEA be borne “unequivocally” by the government.⁶ Yet, as is evident from the Joint Petition, the government seeks to shift these costs to the wireless industry.

In effect, the Joint Petition seeks to by-pass CALEA funding mechanisms. DOJ/FBI attempt to restrict the eligibility of carriers to reimbursement for modification of equipment, facilities, and services installed or deployed on or before January 1, 1995, by defining “installed or deployed” to mean: “[O]n a specific switching system, equipment, facilities, or services are operable and available for use by the carrier’s customers.”⁷ Such an approach, however, wholly blocks new market entrants like Sprint PCS from being compensated adequately for the modification of equipment, facilities, and services.

⁶ H.R. 103-827, “Additional Views” succinctly summarizes

“Under that compromise, the near term costs for the next four years would unequivocally be borne by the government. Existing switches would be retrofitted with the software necessary to assure wiretap capability. Under this provision, absent a commitment by law enforcement to pay fully for the modifications, a carrier would be deemed to be in compliance with the law and no further action on its part would be required.” (Emphasis added.)

⁷ 28 CFR §100.9.

The DOJ/FBI reimbursement regulations unfairly place the cost of capability requirements on new market entrants. The FBI's regulatory definition fails to acknowledge that Congress intended that carriers be reimbursed to retrofit all existing equipment, facilities, and services at the time CALEA was enacted. By defining "deployed" the same way as "installed," as the DOJ and FBI do, a carrier that installed a Lucent switch, for example, on January 1, 1995 is responsible for paying for capability requirements, even though the identical switch installed one day before is deemed in compliance. New market entrants are blocked from being compensated adequately under the DOJ/FBI regulatory reimbursement definition, since PCS licenses were issued and facilities "installed" after the January 1, 1995 date (even though using equipment deployed before then). The DOJ/FBI reimbursement rules create a competitive advantage for incumbent wireless companies that are eligible for compensation while new market entrants must bear very substantial costs.⁸

III. DOJ/FBI Propose a "Gold-Plated" Capability Standard that Hinders the Development and Deployment of New Services and Technologies

Contrary to §107(b) of CALEA, the DOJ and FBI "punch list" items are not cost effective. Carriers like Sprint PCS already provide traditional electronic surveillance capabilities to law enforcement. Specifically, Sprint PCS has well over 100 Title III voice "wiretaps," pen registers, and traps-and-traces presently operational pursuant to

⁸ By defining "significant upgrade" as "service that impedes law enforcement's ability to conduct lawfully authorized electronic surveillance", the DOJ/FBI try to avoid CALEA's provision (47 USC § 1008(d)) that unless the Attorney General agrees to reimburse carriers, equipment installed on or before January 1, 1995 is deemed to be in compliance unless a carrier significantly upgrades it. See 63 FR 23231, Notice of Proposed Rulemaking, "Implementation of Section 109 of the Communications Assistance for Law Enforcement Act: Proposed Definition of 'Significant Upgrade or Major Modification.'"

various court orders. In fact, the number of court orders directed to Sprint PCS for electronic surveillance is growing at a rate of approximately 25% per month.

Notwithstanding Section 107(b), the proposed “punch list” items are expected to be very expensive and, if adopted, almost certainly will exceed the authorized \$500,000,000.⁹ Although the FBI reports that it has obtained cost information from manufacturers, such information is subject to non-disclosure agreements. Not surprisingly, the only information not subject to a non-disclosure agreement is that provided by Bell Emergis, a company that reportedly proposes a (relatively) less costly network solution. The FBI’s January 26, 1998 CALEA Implementation Report states that “Bell Emergis’ current price estimate to provide a CALEA network-based solution throughout the United States is approximately \$540 million.”¹⁰ Although the Report states that cost estimates carry accuracy disclaimers of up to 100%, it is evident that developing the DOJ/FBI “punch list” items is extremely expensive.¹¹

Requiring wireless carrier to implement the expensive “punch list” items also discourages the development and deployment of new services and technologies, contrary to §107(b). As H.R. 103-827 points out, the “competitive future [of CMRS providers] depends on innovations.” PCS carriers and other CMRS providers have finite resources which need to be devoted to the development and deployment of new services and

⁹ CALEA authorizes \$500,000,000 to be appropriated for fiscal years 1995, 1996, 1997, and 1998, to pay for costs directly associated with modifications to meet capability requirements for equipment, facilities, and services installed or deployed on or before January 1, 1995. See 47 USC §1009.

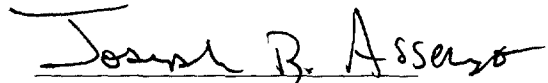
¹⁰ CALEA Implementation Report at 13 (January 26, 1998).

¹¹ The \$500,000,000 is also supposed to cover costs the Attorney General may approve for equipment, facilities, and services deployed after January 1, 1995, as well as costs of complying with CALEA capacity requirements.

technologies, as well as to enhancing coverage areas, aggressive marketing, and reducing consumer telephone prices.

Narrowly construing CALEA's capability requirements serves to balance concerns for privacy, costs to industry, and electronic surveillance needs.¹² Accordingly, Sprint PCS respectfully requests that the FCC reject the Joint Petition.

Respectfully submitted,



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by 

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¹² CALEA is intended to be "both a floor and a ceiling." H.R. 103-827.